WAR FOOD ADMINISTRATION
OFFICE OF DISTRIBUTION
Washington 25, D. C.

SUMMARIES OF DECISIONS BY THE WAR FOOD ADMINISTRATOR
on complaints filed under
THE PERISHABLE AGRICULTURAL COMMODITIES ACT

Number 275 October 13, 1944

S-3130, Sept. 14, 1944, Docket 4341; (S.P.)

In re: TALB RO BROTHERS, BALTIMORE, MD., RESPONDENTS

Violation charged: Failure to keep records required by the Act.

Principal point involved: Failure to keep full records was in violation of section 9 of the Act.

Order: Respondent's license suspended for 60 days, effective at any time within 3 years upon further violation of the Act or regulations; publication of facts.

Outline of facts

On January 28, 1944, a disciplinary complainant charging failure to keep required records was filed against these respondents, based on the following transactions:

1. About June 15, 1943, respondents received and sold at Baltimore 200 crates of strawberries shipped to them from Hammonton, N. J., as a result of respondents' statement to the shipper that they had an order from a canner for that quantity of strawberries at $7 a crate, but respondents failed to keep any record of such order.

2. About May 29, 1943 respondents sold a carload of oranges, and again about June 8, 1943 another carload, and diverted to Philadelphia, Pa. the two carloads which were shipped from Florida.

Respondents had three sales tickets which they said related to their sales of the three shipments, but such tickets did not show it, and respondents failed to keep sales tickets or other records identifying the shipments and showing to whom they were sold. Many of their sales tickets for May and June 1943 were not dated, and those to cash buyers generally did not show the names of the buyers. On Aug. 10, 1943, a representative of the Administration informed respondents of the regulations requiring that sales tickets show the names of the purchasers so far as practicable, but none of their tickets to cash buyers from Oct. 12 to 15, 1943, inclusive, showed the names of the buyers.

A copy of the complaint was served on respondents on Feb. 10, 1944, and on Aug. 8, 1944 they filed an admission of the facts alleged, waived a hearing, and consented to the issuance of an order as set forth below.

Ruling included in decision

By failing to keep full records respondents violated section 9 of the Act, for which suspension of their license is authorized. It has been stated in recent decisions that we do not favor suspended suspensions as a general practice. However, as the parties agreed to a suspension held in abeyance, it was ordered that respondents' license be suspended for 60 days, to become effective at any time within 3 years after Sept. 14, 1944 by supplemental order if it is determined, either with or without further hearing, but with at least 15 days notice to respondents, that they have again violated the Act or the regulations.

Respondents having filed a request and consent to suspension, a supplemental order was issued Sept. 28, 1944, directing that suspension of respondents' license shall not become effective unless some further order to the contrary is issued. The facts were ordered published.

S-3132, Sept. 14, 1944, Docket 4358: (S.P.)

BURNS & BAY, NAMPA, IDAHO v. MARIMAN PRODUCE COMPANY, DES MOINES, IOWA

Violation charged: Unjustified rejection of a carload of potatoes.

Principal points involved: Preponderance of evidence showed there
D-8 was no transit freezing at original destination.

Order: Complainant awarded $157.82, plus interest; publication of facts.

Outline of facts

On Jan. 13, 1943, complainant, acting through a broker, sold to respondent a carload of 450 100-lb. bags of Idaho Standard Russet potatoes, at $2.60 per bag delivered, or for a net total of $845.55. Shipment was made from St. Anthony, Idaho on Jan. 14, and the car arrived at Des Moines, Iowa, Jan. 18. Respondent made inspection the second day after arrival and notified complainant that it did not think the potatoes would grade Idaho Standard because of transit frost. It was not possible to have Federal inspection at Des Moines, so it was agreed between the parties that the car would be shipped to Chicago, Ill., for reinspection and, if shown to grade Idaho Standard, respondent would accept the potatoes. The potatoes graded Idaho Standard at that time, but respondent refused to accept the potatoes and they were resold for net proceeds of $692.73, or for $157.82 less than the original contract price, which included $5 cost of reinspection at Chicago secured at the specific request of respondent. Complainant asked for an award of the amount of loss sustained.

Respondent sought to justify the rejection by emphasizing the fact that the inspection at Chicago was restricted to the upper two layers. It was alleged that after the car arrived at Des moines a few bags in the doorway were removed and frosted bags were found on the bottom layer, and when the potatoes were finally unloaded by the resale purchaser 10 bags were found to be frozen.

The potatoes were inspected at Ashton, Idaho, on Jan. 12 and found to grade Idaho Standard. The certificate issued by the W.W.I.B. at Des Moines after inspection on Jan. 20, stated "No spotted bags or decay found over the top of the load, no car frost found." Certificate of Federal inspection at Chicago, dated Jan. 30, stated the potatoes graded Idaho Standard and that the inspection was restricted to the upper two layers. No statement was made concerning transit frost. Certificate of inspection on Feb. 3, by W.W.I.B. at Milwaukee, where the car was diverted after rejection, showed transit frost was not found on the first inspection but when the produce was unloaded from the car part of the contents in 10 bags were found to be frozen. The carrier allowed $11.50 for the frost damage.

Ruling included in decision

Respondent's rejection was without reasonable cause. If it had desired a more thorough inspection, it should have taken some affirmative action to assure the same. It is probable, however, that the inspector also examined the bags in the doorway, it being his duty to examine all those which are accessible. In addition, the broker stated that he specifically ordered the Federal inspector to check for transit frost. Under these circumstances, the absence of any statement in the inspection certificate concerning the presence of transit frost raised the inderence that none was found. Respondent did not learn until later that the re-inspection was restricted or that when finally unloaded at Milwaukee some bags of potatoes were frozen. Even then, it was questionable whether this damage occurred while the car was in transit between the shipping point and Des Moines. A preponderance of the evidence showed there was no transit freezing at Des Moines. The broker said he personally inspected the shipment there and found none. Complainant was awarded $157.82, plus interest.

S-3133, Sept. 14, 1944, Docket 4328: (S.P.)

EASTERN SHORE OF VIRGINIA PRODUCE EXCHANGE, ONLEY, VA. v. SAMUEL AARON, CLEVELAND, OHIO.

Violation charged: Unjustified rejection of a carload of potatoes.

Principal points involved: Increase of ½ of 1% decay in 5 days transit was not in excess of normal; "good car U.S. No. 1" in f.o.b. sale does not mean mature, bright, clean and sound on arrival; rejection was without reasonable cause.

D-4q

P-3

Order: Complainant awarded $220.28, plus interest; publication of facts.

Outline of facts

On July 17, 1943, complainant sold to respondent a carload of 300 sacks of potatoes, described in the broker's memorandum of sale as "good U. S. No. 1 Star brand Cobblers", at $2.50 per 100-lb. bag f.o.b. Cedar Cove, Va. The car arrived at Cleveland on July 21. Respondent asked complainant through the broker for a reduction of 35¢ per sack in price, and refused to accept complainant's offer of 20¢ per sack and rejected the shipment. On July 24, complainant made resale through the broker at $2.25 per bag delivered Cleveland, or for net proceeds of $529.72 (after payment of freight charges, demurrage, and Federal inspection fees), which was $220.28 less than the original sale price. Complainant claimed the rejection was unjustified and asked for an award to cover his loss.

Respondent testified by deposition that when the broker offered the load he said he would take it if the potatoes were bright color, sound, clean and well matured; that when, after shipment, respondent received a copy of the standard memorandum of sale he complained to the broker that it did not specify what he had ordered; that the broker said a "good" car of U. S. No. 1 potatoes meant they would be mature, bright, clean and sound on arrival. He claimed the potatoes did not comply with contract terms since they were not mature, were decayed, and only fairly clean, and were not in suitable shipping condition.

Federal-State inspection at shipping point on July 17 showed the potatoes were firm, and fairly clean and graded U. S. No. 1, with defects, consisting chiefly of dark, discolored sticky areas, within the tolerance. Less than half of 1% were affected by Soft Rot.

Federal inspection at Cleveland on July 21, restricted to condition factors, showed the potatoes were generally firm and 50% of samples showed no effects of Soft Rot; 40% showed less and 1% to 2%; and 10% showed 5% to 6%; averaging for the load 1% that were affected by Slimy Soft Rot.

Rulings included in decision

Since the potatoes were in suitable shipping condition and no breach of any other warranty was established, it was concluded that respondent's rejection was without reasonable cause in violation of section 2 of the act. The inspections showed an average increase in decay during the five days period in transit of 1/2 of 1% of the potatoes that were affected by Soft Rot, which was not in excess of normal. If an agreement had been made that "good car of U. S. No. 1" potatoes meant that they would be mature, bright, clean and sound at destination, such an agreement would have been contrary to the usual meaning attached to a purchase made on an f.o.b. shipping point basis. It did not appear that there was any agreement to grant an allowance of any specific amount. Complainant was awarded $220.28, plus interest.

S-3134, Sept. 19, 1944, Docket 4286: (Hearing)

In re: J. E. NELSON & SON, ALTOONA AND PITTSBURGH, PA., RESPONDENTS

Violation charged: False and misleading misrepresentations.

Principal points involved: False and misleading statements were made for a fraudulent purpose in violation of Section 2 of the Act; it is illegal for broker to have an interest in transactions adverse to and unknown to his principal.

I-1
B-1

Order: J. E. Nelson's license suspended for 90 days, effective only upon further violation of the Act and regulations within three years; publication of facts.

Outline of Facts

Disciplinary complaint was filed against J. E. Nelson & Son alleging violation of Section 2 of the Act through false and misleading misrepresentations for a fraudulent purpose in connection with its activities as brokers dealing in tomatoes in 1942, potatoes in 1942 and potatoes in 1943. An oral hearing was held on November 16, 1943. A stipulation was entered into on July 29, 1944 in which respondent waived the defenses set up in its answer, its exceptions and application for further argument and consented to the entering of facts substantially as found by the Examiner and of appropriate conclusions and to the issuing of an order conditionally suspending the individual license of J. E. Nelson and consented to publication of the facts. The stipulation contained a statement, however, that the consent and waiver by J. E. Nelson did not constitute admissions of the facts by him.

J. E. Nelson & Son was a partnership composed of James E. Nelson, who is the father of Donald G. Nelson and is the principal and directing partner of the firm and Donald G. Nelson who is now in the United States Army. The main office is in Altoona, Pennsylvania, J. E. Nelson being in personal charge. Donald was in charge of the branch office in Pittsburgh. A license issued to J. E. Nelson & Son was allowed to lapse on May 4, 1944, License issued to James E. Nelson individually on May 24, 1943 is now in effect.

In May and June 1942, acting as brokers and collecting brokerage, respondents sold for the account of the shippers six carloads of tomatoes shipped, with the possible exception of one car, in interstate commerce from Texas and Mississippi. These six carloads were purchased in the name of Ross A. Hatch Sons, a wholesale dealer in Altoona, Pennsylvania. Before any of the six cars were ordered respondents entered into an agreement with Ross A. Hatch Sons that respondents would become the owners of such portion of each carload as Hatch decided respondents should have and would pay Hatch the amount per lug which the tomatoes cost under the contract with the shipper. As a result of the agreement respondents purchased approximately two-thirds of the six carloads and resold or attempted to resell the tomatoes. On June 30, 1942 respondents asserted a claim against the railroad as owner of three lugs of tomatoes from one of the cars lost by theft. Respondents did not inform the shippers or sellers that respondents had an agreement with Hatch to take title to any portion of each carload.

On the other hand, respondents sent misleading wires to the shippers indicating that Hatch had the sole interest in the purchase of the tomatoes. As a result of a telegram sent to one of the shippers the price of the tomatoes in one of the cars was reduced $182.50 and this resulted in reducing by $107.00 the cost to respondents of their portion of the car. About a year after the tomato transactions respondents rendered an account sales to Ross A. Hatch Sons showing profit on the resale of the tomatoes taken from four cars and a loss on the other two cars. Hatch paid the amount of the net loss to respondents approximately a year after the handling of the tomatoes. Hatch did not agree before the handling of the tomatoes that the profit and loss from the tomatoes resold by Nelson would be charged to Hatch's account nor did they agree that any accounting was to be rendered by respondents to Hatch.

In January 1943, knowing that a dealer in Pittsburgh desired to purchase two carloads of Katahdin potatoes and did not wish to purchase Green Mountain potatoes, and that a certain shipper in Maine was offering Green Mountain potatoes, respondents by wire ordered a car of potatoes for the Pittsburgh buyer and the shipper confirmed a car of "U. S. No. 1 Mountains" and made shipment accordingly. The buyer refused to accept the potatoes because they were not the variety purchased.

On November 5, 1942, without authorization from the shipper to sell potatoes for his account, respondents confirmed to each of three Pittsburgh buyers a car of Green Mountain potatoes from a certain shipper in northern Maine and on the same date J. E. Nelson, acting for respondents, ordered the three carloads from another shipper in central Maine. It was a well-known fact in the trade that the first mentioned shipper's potatoes were preferable to those coming from the shipper in central Maine. All of the buyers wanted the first shipper's potatoes and none would have placed orders at the price agreed on had they known that the potatoes would be ordered from the other shipper. The potatoes were rejected upon arrival, although one carload was accepted after an allowance had been made. Respondents did not notify the buyers that the potatoes had been ordered from the central Maine shipper until November 9 and did not cancel the copies of confirmations sent to the central Maine shipper until November 9 when the shipper telegraphed an inquiry concerning two confirmations received.

Rulings included in Decision

1. J. E. Nelson violated Section 2 of the Act. The false and misleading statements made to shippers of the tomatoes were made for the fraudulent purpose of leading the shippers to believe that respondents had no interest except to secure for the shippers the highest price obtainable for the tomatoes. Respondent J. E. Nelson knew as the result of previous proceedings against him that it is illegal for a broker to have an interest in the transaction adverse to and unknown to his principal. The telegram sent by J. E. Nelson to the Maine shipper in January 1943 and telephone conversation were for the fraudulent purpose on the part of J. E. Nelson of inducing the shipper to ship and the buyer to accept a car of Green Mountain potatoes, although Katahdin potatoes had been ordered. In connection with the sale of three carloads of potatoes in November 1942, false and misleading statements were made orally, by telegram and through the issuance of confirmations, both to the shippers and to the buyers for the purpose of inducing the shipper to ship in

interstate commerce and of inducing the buyers to accept the potatoes which had been ordered, in order that the respondents might obtain brokerage on the sales.

2. The license of J. E. Nelson, one of the respondents, was suspended for 90 days, but the suspension was not to take effect if he filed a certain request and consent to subsequent suspension under certain conditions. In a supplemental order dated October 2, 1944, it was stated that such a paper had been filed and that the suspension of respondent's license should not become effective unless some further order to the contrary is issued. Under these orders the suspension may be made effective at any time by supplemental order without further hearing, but with at least five day's notice to the respondent, if it is found within three years from September 19, 1944 that respondent has again violated any of the provisions of the Act and the regulations. The facts and circumstances were ordered published.

S-3135, Sept. 19, 1944, Docket 4306: (S.P.)

F. J. CRIVELLA, PITTSBURGH, PA. v. H. P. HALE & SON, GIBSON, TENN.

Violation charged: Failure to deliver a car of tomatoes in accordance with contract terms.

Principal points involved: Seller's failure to pay allowance granted through its agent was in violation of section 2 of the Act; tomatoes showing at destination 6% decay and 6% sunken discolored areas, after normal transit, were not in suitable shipping condition.

M-7

D-4x Order: Complainant awarded $337.50, plus interest; respondent's countercomplaint dismissed; publication of facts.

Outline of facts

On June 22, 1943, complainant purchased from respondent, through a broker acting as agent for both parties, as approximately 90% U. S. No. 1, a carload of tomatoes which graded approximately 88% U. S. No. 1 at shipping point and contained no decay, at $4.50 per lug f.o.b. Gibson, Tenn. The car arrived at Pittsburgh, Pa., June 26, after four days in transit, which was found to be according to normal schedule in view of war-time difficulties in transportation. Inspection at 1:15 on that date showed an average of 8% decay. Complainant claimed to have notified respondent's broker of the abnormal deterioration and that respondent granted an allowance of 50% per lug, or $337.50; and that, relying upon such allowance, complainant paid the full amount of respondent's draft, but respondent failed to remit to cover the allowance, for which an award was asked.

Respondent claimed that he agreed to refund 50¢ per lug in reliance upon false information given by the broker, acting as complainant's agent, that the shipping point inspection certificate had been reversed by an appeal inspection, and that the contract of sale was fully complied with, the decay found by the inspection made at Pittsburgh not being found excessive and not showing that the tomatoes were not in suitable shipping condition. He filed a countercomplaint for recovery of loss alleged to have been sustained because of complainant's unjustified rejection of another car of tomatoes, shipped June 23, 1943, sold on an f.o.b. basis as U. S. No. 1, and certified at Gibson as grading U. S. No. 1, with no decay, claiming that inspection at Pittsburgh on June 28 (car having arrived Saturday, June 26) was restricted to the top layer or the top two layers, which would indicate an average for the entire load of less than 5% decay, the usual tolerance permitted for decay at destination, and concluding that 6% in the top layer of tomatoes delayed one day in transit and remaining on track 36 hours before inspection at destination does not indicate a lack of suitable shipping condition.

The broker, in a letter dated July 15, 1943, incorporated in complainant's opening statements of facts, stated that respondent was informed that the inspection of the tomatoes in the car first mentioned above, made on June 26, showed that an average of 8% were affected by decay, and that this percent is beyond the tolerance for a car confirmed as 90% U. S. No. 1. The broker stated that he did not inform respondent that the shipping point inspection had been reversed.

Rulings included in decision

1. Complainant accepted the tomatoes covered by his complaint, relying on the allowance granted by the broker, who was acting as agent for respondent, and respondent's failure to pay the allowance was in violation of section 2 of the Act. The preponderance of the evidence supported the view that the broker did not give its principal the false information that the inspection had been reversed. Complainant was awarded $337.50, plus interest.

2. The tomatoes in the car covered by the countercomplaint were not in suitable shipping condition. Inspection on June 28 showed an average of 6% decay, ranging from 3 to 12%, and in addition an average of 6% sunken discolored areas. This amount of decay was in excess of the tolerance permitted and, together with the average of 6% sunken discolored areas, was abnormal. It must be presumed that if the inspection had been limited to any particular layer or layers the inspector would have noted the same on the certificate. The tomatoes moved according to normal transportation, since four days in transit from Gibson to Pittsburgh can not be considered abnormal in June 1943, and the delay in inspection until Monday was not unreasonable in view of the fact that inspections are not usually made on Sunday. Respondent's countercomplaint was therefore dismissed.